LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 1 1989
JOHN F. DAVIS, CLERK

In The
SUPREME COURT OF THE UNITED STATES

No. 416

L. E. RIFFE, *Petitioner*,

vs.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GERALD G. STAMPER
THORNTON & STAMPER
1111 Mid-Continent Building
Tulsa, Oklahoma 74103
918-587-2544

TABLE OF CONTENTS

	Page
Foreword	1
Reports of Opinions of Courts Below	1
Grounds on Which Jurisdiction Is Invoked	2
Question Presented for Review	2
Constitutional or Other Enactment of Law Involved	3
Statement of the Case	3
Basis for Federal Jurisdiction in Court of First Instance	7
Argument for Allowance of Writ	7
Appendix	14

TABLE OF CASES

American Investment Co. of Illinois v. Lichtenstein, 134 F. Supp. 857 (E.D. Mo., 1955)	12
Cowell v. McMillin, 177 Fed. 25 (9th Cir., 1910)	12
Escott v. Barchris Construction Company, 283 F. Supp. 643 (S.D. N.Y., 1968)	7
J. C. Peacock, Inc. v. Hasko, 196 Cal. App. 2d 353, 88 A.L.R. 2d 1430 (1961)	10
Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 34 N.E.2d 704 (1941)	12
Little Rock Towel & Linen Supply Co. v. Independent Linen Service Co., 237 Ark. 877, 377 S.W.2d 34 (1964)	12
Lydia E. Pinkham Medicine Co. v. Gove, 303 Mass. 1, 20 N.E. 2d 482 (1939)	9

Page

Mardel Securities, Inc. v. Alexandria Gazette Corporation, 320 F.2d 890 (4th Cir., 1963) 12

Richardson v. Blue Grass Mining Co., 29 F. Supp. 658 (E.D. Ky., 1939), aff'd. per curiam 127 F.2d 291 (6th Cir., 1942), cert. den. 317 U.S. 639, 63 Sup. Ct. 30, 87 L. Ed. 515 (1942) 11, 12

Securities and Exchange Commission v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D. N.Y., 1966), mod. and aff'd. 401 F.2d 833 (2nd Cir., 1968) 7

United States v. Bowen, 290 F.2d 40 (5th Cir., 1961) 10

STATUTES

15 U.S.C. §78a, et seq. 7

28 U.S.C. §1254(1) 2

MISCELLANEOUS

Fletcher, Cyclopedia Corporations, §2145 (Perm. Ed. 1967 Rev. Vol.) 11, 12

6 Cavitch, Business Organizations, §127.06 (a) (1964) 12

In The
SUPREME COURT OF THE UNITED STATES

No. _____

L. E. RIFFE, *Petitioner*,

vs.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

L. E. Riffe respectfully petitions the Supreme Court of the United States for a writ of certiorari for review of the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the case of Wilshire Oil Company of Texas, Appellant, versus L. E. Riffe, Appellee, on the appeal of a judgment entered by the United States District Court for the Northern District of Oklahoma, and, for such petition, states to the Court as follows:

I

REPORTS OF OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit of which review is sought is reported at 406 F. 2d 1061. The opinion of that Court on a prior appeal in this case is reported at 381 F. 2d 646. Petitioner sought a petition for writ of certiorari for review of the prior opin-

ion, but his petition was denied by memorandum order of this Court which is reported at 389 U. S. 822, 88 Sup. Ct. 50. A copy of each opinion of the Circuit Court is appended.

The judgments rendered by the trial court, the United States District Court for the Northern District of Oklahoma, have not been reported, officially or unofficially.

II

GROUNDS ON WHICH JURISDICTION IS INVOLKED

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on February 4, 1969, in accordance with the Court's opinion filed on the same date.

Petitioner applied for an extension of time from February 24, 1969, until March 3, 1969, in which to file a petition for rehearing. Such petition was filed on February 27, 1969, and denied by the Circuit Court on March 17, 1969.

On March 28, 1969, Respondent filed with the Circuit Court a pleading styled "Motion for Clarification of Mandate", to which Petitioner responded on April 3, 1969. The Circuit Court treated the "motion" as a petition for rehearing and denied it on May 29, 1969.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question on writ of certiorari is 28 U. S. C. §1254(1).

III

QUESTION PRESENTED FOR REVIEW

Petitioner, who was a director and salaried officer of

Respondent corporation, became aware of a business opportunity which he fully disclosed to the corporation. Respondent, acting through its board of directors, elected to seize and take advantage of the opportunity, but later reversed its decision and directed Petitioner to obtain the release of Respondent from all contractual obligations it had incurred with respect to the opportunity. Petitioner succeeded in obtaining Respondent's release. Third parties then formed a corporation to exploit the opportunity. One of such parties made a gift of stock in the newly-formed corporation to trusts for the benefit of Petitioner's children. Petitioner had no involvement with that corporation and continued to serve Respondent faithfully and well. He has already paid to Respondent an amount equal to the profit realized by the trusts from the stock. Is Petitioner also required to forfeit to Respondent all compensation earned during the period of ownership of the stock by the trusts?

IV

CONSTITUTIONAL OR OTHER ENACTMENT OF LAW INVOLVED

This case involves no constitutional provisions, treaties, statutes, ordinances or regulations.

V

STATEMENT OF THE CASE

On December 30, 1960, Respondent, by merger, acquired Riffe Petroleum Company, a closely-held corporation owned principally by Petitioner, which engaged in the marketing of asphalt and asphaltic materials. Subsequent to the merger, Riffe Petroleum Company continued substantially the same operations as a division of Respondent. Petitioner became executive vice president and a director of Respondent, his

primary responsibility being the management of the Riffe Petroleum Company Division.

In late 1961, Petitioner became aware of an opportunity to construct and operate an asphalt manufacturing plant at Ponca City, Oklahoma. This plant would be constructed on land of Cities Service Petroleum Company and operated in conjunction with its refinery, utilizing refinery by-products in the manufacture of asphalt. Petitioner negotiated a contract with Cities Service on behalf of Respondent for construction and operation of the asphalt plant and the supply of raw materials. This contract was approved and ratified by Respondent's board of directors and Petitioner proceeded with arrangements for construction.

Thereafter, Respondent changed its mind about owning and operating the plant and instructed Petitioner to extricate it from the contractual obligations that it had incurred. In order for him to accomplish that task, it was necessary for him to convince personal acquaintances of the attractiveness and soundness of the opportunity. These acquaintances then formed a corporation, Redstone Asphalt and Petroleum Company ("Redstone"), to construct and operate the asphalt plant. Redstone thereafter negotiated and entered into a contract with Cities Service for construction and operation of the asphalt plant, which contract was substantially identical to the earlier contract between Respondent and Cities Service. As a condition to releasing Respondent from its contract, however, Cities Service required that Petitioner personally guarantee performance by Redstone of its contract. Petitioner then made this guaranty in order to obtain the release of Respondent. Further, for Redstone to obtain the money needed to construct the plant, it was necessary for Petitioner to guarantee payment, to the extent

of eighty per cent, of a loan in the amount of $274,000.00, which Redstone obtained from a Tulsa bank. Respondent was fully informed of these guarantees by Petitioner.

A. V. Murray, originally a defendant in this case, one of Petitioner's acquaintances who had formed the Redstone corporation, owned sixty per cent of the capital stock of the corporation. While the asphalt plant was in the process of construction, Mr. Murray sought to sell to Petitioner at his cost one-half of that stock and to give to Petitioner one-half of a commission he was to receive from the company building the plant, in appreciation of Petitioner's having brought the opportunity to his attention initially. Petitioner declined the gratuity.

Subsequently, Mr. Murray arranged for the transfer of the stock and commission to the trustees of irrevocable trusts which Petitioner and his wife had previously created for each of their six daughters. As found by the trial court, Petitioner had no control or direction over these trusts, directly or indirectly, and had no interest therein, other than as settlor and a normal paternal interest. The transfers to the trust were not pursuant to any agreement between Mr. Murray and Petitioner.

In September, 1962, the asphalt plant was completed and commenced production. In December of that year, all of the stock of Redstone was sold to Inland, Inc., for approximately $112,000.00. For the thirty per cent of the stock owned by the trusts, $36,888.59 was received, resulting in a profit of approximately $28,000.00.

Respondent operated the Riffe Petroleum Company Division for a twenty-nine-month period and realized profits

of approximately $400,000.00 before selling the division to another firm at an additional profit of $377,000.00. Thereafter, in December, 1963, Respondent instituted this action, seeking, *inter alia*, to recover the profit made by the trusts on the sale of the Redstone stock and all compensation paid to Petitioner on the grounds that ownership of the stock by the trusts and other alleged misconduct on the part of Petitioner constituted breaches of his employment contract and fiduciary obligations to Respondent. Non-jury trial resulted in judgment for Petitioner and all other defendants on all of Respondent's claims, except one small claim, as to which the defendants confessed judgment. On appeal, the Circuit Court found that the transactions involving the asphalt plant and the stock of Redstone Asphalt and Petroleum Company constituted breaches of Petitioner's contractual and fiduciary duties to Respondent and remanded the case for determination of damages.

Upon remand, the District Court, following a hearing, found that the trusts had received a total of $35,913.59 in profit on the Redstone stock and the construction commission. Judgment for that amount, plus interest of $11,037.14, was rendered in favor of Respondent and paid by Petitioner.

Respondent, contending that the District Court had erred in not adjudging that Petitioner should also repay all compensation that he had earned during the period in which the Redstone stock was owned by the trusts, perfected the second appeal in this case. The Circuit Court held that its previous findings of a breach by Petitioner of his contractual and fiduciary duties to Respondent required that he forfeit and return to Respondent all of his earnings during that period.

VI

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction of this case in the United States District Court for the Northern District of Oklahoma was founded on diversity of citizenship and amount. Respondent is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in Colorado. Petitioner and the other defendants in the trial court are all citizens and residents of the State of Oklahoma. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

VII

ARGUMENT FOR ALLOWANCE OF WRIT

There is presently no area of civil law attracting greater concern and attention than that relating to the potential liability of corporate directors and officers. More articles in law reviews and commentaries, more time in seminars and institutes and more study by corporate counsel and other members of the bar have recently been devoted to this area than to any other aspect of the law, except possibly civil rights and criminal matters. While much of this interest has been sparked by *Escott v. Barchris Construction Company*, 283 F. Supp. 643 (S.D. N.Y., 1968), and *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D. N.Y., 1966), mod. and aff'd. 401 F.2d 833 (2nd Cir., 1968), and their progeny which involve the responsibilities of corporate "insiders" under the Securities Exchange Act of 1934, as amended (15 U.S.C. §78a *et seq.*), the concern is not limited to potential liability under that Act.

It is essential that, in the complex system of modern

commerce and industry, the managers of corporate enterprises be able to assess and determine reliably their obligations to the companies and stockholders which they serve, their freedom to engage in outside activities, and their economic liability to others if they overstep the ascertaintions imposed by law upon their activities, neglect, stagnation and failure to develop the myriad of business opportunities which are constantly presented will necessarily result.

In the situation presented by the facts in this case, under the law as theretofore developed, Petitioner would have been free to seize and exploit personally the opportunity presented. The Circuit Court changed the law, however, and applied unwarranted penalties. When the opportunity to own, operate and exploit the asphalt plant at Ponca City arose, Petitioner knew that it was potentially profitable to his employer, Respondent, to whom he owed duties of disclosure. Petitioner fully revealed the opportunity and urged Respondent to grasp the opportunity. Upon disclosure, Respondent said "yes" and Petitioner consummated the necessary contracts. Whatever the reason, Respondent changed its corporate mind and, acting through its board of directors, told Plaintiff to extricate it from its obligations to construct and operate the proposed asphalt manufacturing plant. At that point, the issue in this case, and the question presented by this petition was posed.

Having fully and honestly presented a business or corporate opportunity to the corporation which employed him as an officer and director and having had that opportunity rejected by the corporation, what was Petitioner's position with respect to personal exploitation?

(For the purposes of this petition, ignored are the legal implications of the fact that Petitioner did not thereafter have any personal involvement with the opportunity and that his sole, but indirect, connection therewith was the ownership by irrevocable trusts, of which his daughters were the beneficiaries, of stock of the corporation created by unrelated parties to exploit the opportunity.)

From the statement of the case, it is apparent that, had Petitioner done nothing after Respondent rejected the opportunity, Respondent would have faced substantial liability for breach of its contract with Cities Service and no one, investor or the public, would have benefited from construction and operation of the asphalt manufacturing plant. Such losses to all concerned are the inevitable consequences of the rule for which Respondent contends and which the Circuit Court has sanctioned and promulgated for those corporations, stockholders and fiduciaries within its geographic sphere. Petitioner submits that such a rule is contrary to established principles of law and equity and will have the unwarranted effect of restricting the development of commerce and industry.

The concepts of law to be analyzed in determining the right of an officer or director of a corporation to avail himself of an opportunity rejected by his corporation are a curious amalgam of the principles historically applicable to the relationships of masters and servants, agents and principals and trustees and beneficiaries. This lack of clear definition of applicable principles was exemplified in *Lydia E. Pinkham Medecine Co. v. Gove*, 303 Mass. 1, 20 N.E. 2d 482 (1939), wherein the court drew upon various unrelated concepts to assess the rights of a corporate employee.

In its decision in this case, the Circuit Court has established the rule that a corporate fiduciary, who acquires an interest in a venture which his corporation has rejected, must not only lose any profit obtained, but must, additionally, bear the harsh penalty of forfeiture to his employer of any compensation earned for his faithful service during the period of ownership of an interest in the rejected venture. This rule is invoked and applied without regard to the gain realized by the corporation during the same period by sole reason of the fiduciary's diligent service to his employer.

To reach its decision, the Circuit Court has relied upon only the *Restatement of the Law*, an exposition by a collection of authors of what they think the law is or ought to be, a portion of a section from *Fletcher on Corporations*, the opinion of an intermediate California court in *J. C. Peacock, Inc. v. Hasko*, 196 Cal. App. 2d 353, 88 A.L.R. 2d 1430 (1961), and the ruling of a federal court upon the sufficiency of a complaint to withstand a motion to dismiss in *United States v. Bowen*, 290 F.2d 40 (5th Cir., 1961). Such authorities, even if in point, would be of scant significance as the basis for as far-reaching a decision as the Circuit Court has rendered.

In *J. C. Peacock, Inc. v. Hasko, supra*, the employee-officer had, through fraud and chicanery, obtained excessive bonuses from his employer. The corporation successfully sued to recoup the bonuses, but asserted no claim whatsoever to recover salary paid to the defendant. Thus, clearly the holding of the California District Court of Appeals in that case has no relevancy to the issue posed by the facts of this case, wherein there is no claim of fraud or unfaithful service.

In *United States v. Bowen, supra*, the appellate court, without the benefit of an opinion by the district court or a

brief by the appellee, considered on appeal the correctness of the trial court's dismissal of the Government's complaint seeking to recover wages paid to a former employee during the period when he was allegedly engaged actively in arranging to realize, after the impending termination of his employment by the Government, substantial personal profits, at the expense of the Government, from contracts which he arranged with foreign nationals. The court held no more than that a determination of the substantive issues would be dependent upon the particular facts developed during a trial and that a decision upon the merits of the Government's claim should await the presentation of the evidence.

In Fletcher, *Cyclopedia Corporations*, §2145 (Perm. Ed. 1967 Rev. Vol.), the section relied upon by the Circuit Court, the learned author expressly recognizes that, even though an officer of a corporation may have breached his duties, he will not be denied compensation for his labor and beneficial services which have enriched the stockholders. This well-established rule is grounded upon equity and fairness and not upon illogical adherence to inapplicable concepts of imposing a penalty or fine upon an unfaithful servant or agent.

One of the leading cases in support of this rule of fairness in denying forfeiture of compensation is *Richardson v. Blue Grass Mining Co.*, 29 F. Supp. 658 (E.D. Ky., 1939), aff'd. *per curiam* 127 F.2d 291 (6th Cir., 1942), cert. denied 317 U.S. 639, 63 Sup. Ct. 30, 87 L. Ed. 515 (1942). Therein, the managing group of an enterprise had paid its members excessive salaries, had used funds for their personal purposes without paying interest and had deprived other owners of their fair share of the enterprise. Nevertheless, the enterprise had been quite successful financially during a period when similar businesses were suffering economically. The

court, recognizing that there were no inflexible rules applicable in such cases, held that it would be inequitable to deny compensation to the managing group for its efforts, which had substantially enhanced the value of the enterprise. That decision is recognized as embodying the proper test for determining an officer's right to receive or retain compensation for his honest efforts, even though he may have failed to fulfill certain of his duties. *Mardel Securities, Inc. v. Alexandria Gazette Corporation,* 320 F.2d 890 (4th Cir., 1963); Fletcher, *Cyclopedia Corporations,* §2145 n. 71 (Perm. Ed. 1967 Rev. Vol.).

The Circuit Court has, by its decision in this case, ignored the prior holdings of the Courts of Appeals for the Sixth Circuit in the *Richardson* case, *supra,* and the Fourth Circuit in the *Mardel Securities* case, *supra,* and has established in the Tenth Circuit a conflicting rule based upon inflexible application of the ancient concept that unfaithful servants shall have no pay.

The Circuit Court has also disregarded, in passing over the threshold issue, the well-established rules, sometimes referred to as the "Corporate Opportunity Doctrine", which state that, when an opportunity has been rejected by a corporation, a director or officer may thereafter treat the opportunity as his own and the corporation is barred from challenging his action. *Cowell v. McMillin,* 177 Fed. 25 (9th Cir., 1910); *American Investment Co. of Illinois v. Lichtenstein,* 134 F. Supp. 857. (E.D. Mo., 1955); *Little Rock Towel & Linen Supply Co. v. Independent Linen Service Co.,* 237 Ark. 877, 377 S.W.2d 34 (1964); *Lincoln Stores, Inc. v. Grant,* 309 Mass. 417, 34 N.E.2d 704 (1941); 6 Cavitch, *Business Organizations,* § 127.06 (5) (1964).

Consistency in the law and its application is indispensible to the achievement of justice. Consistency and clarity are particularly important in that area of the law defining the obligations, privileges and liabilities of corporate fiduciaries, if American corporate business is to function efficiently. This area of the law is presently receiving widespread attention and study. Notwithstanding this essential requirement for consistency, the Circuit Court has rendered in this case an opinion which conflicts directly with previously-settled principles. If this opinion is not reviewed by this Court, the officers and directors of corporations subject to the jurisdiction of courts within the Tenth Circuit will find themselves burdened with unjustly stringent rules of liability unlike those applied in other circuits. Petitioner respectfully prays, therefore, that a writ of certiorari be issued for review of the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

GERALD G. STAMPER
THORNTON & STAMPER
1111 Mid-Continent Building
Tulsa, Oklahoma 74103
918-587-2544

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed, United States Court of Appeals, Tenth Circuit Feb. 4, 1969. William L. Whittaker, Clerk.

No. 10049.

WILSHIRE OIL COMPANY OF TEXAS a corporation,
Appellant,

v.

L. E. RIFFE, *Appellee.*

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Appeal from the United States District Court for the Northern District of Oklahoma.

(District Court No. 586 Civil).

WILSHIRE OIL COMPANY OF TEXAS, a corporation,
Appellant,

v.

L. E. RIFFE, Appellee.

Richard H. Shaw, Denver, Colorado (Leland E. Modesitt, of Modesitt and Shaw, Denver, Colorado, and Robert J. Woolsey, of Farmer, Woolsey, Flippo & Bailey, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellant.

David M. Thornton, Tulsa, Oklahoma (Thornton, Stamper & Dalton, and Gerald G. Stamper, Tulsa, Oklahoma, with him on the Brief), for Appellee.

Before PHILLIPS, HILL, and SETH, Circuit Judges.
SETH, Circuit Judge.

This is an appeal by the plaintiff-appellant from a portion of the judgment of the trial court in this action which was commenced by the plaintiff corporation against one of its former corporate officers. The suit was to recover profits made by the corporate officer by participating in competitive enteprises, in receiving personally commissions for corporate construction work, and to recover the compensation paid to the officer by the corporation during the period he was interested in a competitive corporation.

This is the second appeal. This court on the first appeal reversed and remanded the case, holding that the defendant had breached his duty to the corporation and had engaged in activities contrary to the terms of his contract of employment (Wilshire Oil Co. of Texas v. Riffe, 381 F. 2d 646). On remand the trial court entered judgment on the claims for recovery of the profits made through participating in a competitive coporation, but denied the corporation recovery of the compensation it paid to the defendant for this period.

The nature and extent of the fiduciary duties owed by a corporate officer to the corporation he serves have been long established. This matter was considered at some length in the previous opinion in this case as it related to these facts and need not be repeated here. As stated in the first opinion the acts of the appellee also constituted a breach of his contract of employment. On the prior appeal all the basic and determinative issues were thus decided.

When a corporate officer engages in activities which constitute a breach of his duty of loyalty, or if it is a wilful breach of his contract of employment, he is not entitled to compensation for services during such a period of time although part of his services may have been properly performed. In the Restatement (Second), Agency § 469 the above doctrine is set forth, and this is followed by the comment which states in part:

> "An agent, who, without the acquiescence of his principal, acts for his own benefit or for the benefit of another in antagonism to or in competition with the principal in a transaction is not entitled to compensation which otherwise be due him."

The comment continues and states that the agent is not entitled to compensation although the acts may not actually harm his principal and even if he thinks his actions will benefit the principal or he is otherwise "justified" in "so acting." See also Fletcher, Corporations (Perm. Ed.) § 2145; J. C. Peacock, Inc. v. Hasko, 196 Cal. App. 2d 353, 88 A.L.R. 2d 1430; United States v. Bowen, 290 F.2d 40 (5th Cir.).

This rule is applicable to the case before us, and it is not necessary to again describe the several breaches of duty involved which were clearly established in the record. The record shows, as to one of the principal events, that the failure commenced on or before May 31, 1962, and continued to the end of the year when the officer's employment terminated. It was then also that the particular division which he was responsible for was sold by the corporation. The record thus sets out the period of this violation, and this is sufficient to apply the above doctrine. Thus we hold that the appellee was not entitled to compensation of any kind from May 31, 1962, to December 31, 1962.

The appellee argues that the corporate division he was responsible for made money during the period in question, and that the division was itself sold at a profit to appellant corporation. However, under the authorities or on any other basis, this is no answer to the established violation of duty. The fact that the division may have made money does not provide that no breach took place nor does it excuse one any more than a failure to make money demonstrates a breach of duty. The same may be said about whether the officer considered that he was acting properly or in good faith.

The case is reversed and remanded to the trial court with directions to enter judgment for appellant against appellee in an amount equal to seven-twelfths of all compensation (both salary and bonus) paid to appellee for services during the calendar year 1962. This judgment is not to include any pre-judgment interest, as we hold that the damages were unliquidated within the meaning of the Oklahoma state decisions.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Filed, United States Court of Appeals, Tenth Circuit Jan. 5, 1967. William L. Whittaker, Clerk.

Appeal From The United States District Court For The Northern District of Oklahoma.

No. 8536 — DECEMBER 1966 TERM

WILSHIRE OIL COMPANY OF TEXAS, Appellant,

vs.

L. E. RIFFE, R. L. FELTS, O. HOMER RIFFE, A. V. MURRAY, and A. V. MURRAY, INC., Appellees.

Richard H. Shaw, Denver, Colo. (Rodney O. McWhinney, Modesitt and Shaw, Denver, Colo., and Robert J. Woolsey, of Farmer, Woolsey, Flippo & Bailey, Tulsa, Okla., of counsel, with him on the Brief), for Appellant.

David M. Thornton, Tulsa, Okla. (Gerald G. Stamper, Tulsa, Okla., with him on the Brief), for Appellees.

Before PICKETT and SETH, Circuit Judges, and CHRISTENSEN, District Judge.

SETH, Circuit Judge.

This action was commenced by the appellant, Wilshire Oil Company of Texas, against certain of its former employees and a third party. The action sought damages, the recovery of compensation paid to the employees, and for an accounting of profits they allegedly made. The complaint asserted that the former employees engaged in activities which were contrary to their employment contracts and their fiduciary obligations to the company. It also asserts that the third party assisted the other defendants in their activities and was likewise liable.

The trial was had before the United States District Court for the Northern District of Oklahoma, and relief was denied. Appellant Wilshire has taken this appeal, asserting that certain findings of the trial court were not supported by the evidence and that there were errors of law.

The record shows that Wilshire obtained through a merger a company which had theretofore been owned principally by L. E. Riffe. This corporation, following the merger, became a division of Wilshire, but its officers and management continued very much as theretofore. L. E. Riffe became executive vice president of Wilshire and a director. He was in charge of the new division of Wilshire Oil Company which was known as the Riffe Division. Mr. Riffe was employed under a written contract of employment by which he agreed to devote his full business time to the performance of his duties as an employee and officer of Wilshire and he further agreed that he would not invest in, be employed by, or work for any other firm or corporation "competitive with the Riffe Division." The contract further provided that investment in the stock of a competitor would constitute a breach of the contract. Such a "competitor" was defined to include any firm or corporation engaged in "purchasing and/or selling and/or producing asphaltic materials in any of the areas in which the Riffe Petroleum Company was engaged in purchase and/or sale and/or producing asphaltic materials."

The record shows that the Riffe Division purchased asphalt from various oil refineries in Oklahoma and in Kansas and sold the product in Oklahoma and other nearby states.

At the end of 1961 L. E. Riffe negotiated and signed on behalf of Wilshire Oil Company a contract with Cities Service Petroleum Company for the construction of an asphalt plant. The agreement also provided that Cities Service would furnish raw materials, and Wilshire would sell the products. Wilshire thereafter decided not to proceed with the construction of the plant and directed Mr. Riffe to terminate the agreement. Mr. Riffe then advised several business men of the possibility of constructing the plant, and this group organized the Redstone Asphalt and Petroleum Company. A. V. Murray, a friend of Mr. Riffe, was one of this group, and he purchased sixty per cent of the corporate stock. Redstone thereafter negotiated further with Cities Service, and in June 1962 entered into a new agreement for building the plant and sale of its output. Wilshire was thereby released from its contract with Cities Service. With the Redstone contract Mr. Riffe guaranteed that Redstone would perform for Cities Service, and he also guaranteed a portion of a bank loan made to Redstone.

In May 1962 Mr. Riffe signed an affidavit for Wilshire which purported to set out what his relationship with Redstone was and would be. In this affidavit he stated that his only interest in the Redstone-Cities Service contract would be as a guarantor. He further stated that he was not a stockholder of Redstone nor had any arrangements whereby he would receive any profits which Redstone might receive under its contract with Cities Service. In this affidavit he further stated his only interest in Redstone "monetarily or otherwise, is as a guarantor of Redstone's contract with Cities Service and its loan secured for the construction and equipment of an asphalt plant. . . ." He further stated in the affidavit that he would not do anything nor permit anything to be done by reason of his guarantee of Redstone's obliga-

tions which would "jeopardize, interfere, or restrict in any manner whatsoever, his duties to Riffe Petroleum Company, a division of Wilshire, and that he shall continue to faithfully and diligently perform such duties required of him as an officer, director and stockholder of Wilshire."

The plant construction by Redstone was delayed and meanwhile it purchased asphalt for sale to its customers from Wilshire at a reduced price. It was apparent that Redstone was intended to be a competitor of Wilshire and would become such competitor when it first commenced the sale of asphalt to its customers.

At the end of May 1962 Mr. Riffe and his wife executed six trust instruments, creating separate trusts for each of their young daughters. The two trustees at the time the trusts commenced were O. Homer Riffe who was a brother of Mr. Riffe, and the other was an attorney of Mr. Riffe. The trust instruments recited that Mr. Riffe and his wife thereby transferred to the trusts the properties which were listed on schedule A attached to the trust. This first schedule was apparently prepared about the time the trusts were created. On this schedule are listed, for each of the six trusts, 150 shares of Redstone stock; an undivided interest in a note of Universal Asphalt Company, which is also in issue here; an interest in a commission contract between A. V. Murray and the corporation which constructed the asphalt plant, in issue in this case; and in addition, oil and gas leaseholds, royalties, and other interests.

The six trusts according to the schedules attached to each thus held in May 1962 thirty per cent of the total issued and outstanding stock of Redstone. The record also shows that Wilshire had no knowledge of the fact that these stocks were in the family trusts of Mr. Riffe.

The record is not entirely clear as to why these shares of Redstone were transferred to the trusts, but it shows that they were transferred by Mr. A.V. Murray from the

shares he held in Redstone. The court found that in July 1962 Mr. Murray attempted to sell one-half of his stock of Redstone to Mr. Riffe at a price equivalent to Mr. Murray's cost. The court found also that Mr. Riffe rejected this offer and informed Mr. Murray that his employment contract with Wilshire prohibited him from owning such stock. The court further found that Mr. Murray thereafter, "voluntarily and without demand by L. E. Riffe, . . ." transferred the stock to the six trusts for the Riffe daughters and likewise assigned one-half of his interest in the commission for the construction of the Redstone plant. The court found that the transfer of stock was not in accordance with any previous arrangement between the parties, and that Mr. Murray made the transfers ". . . to express his appreciation to L. E. Riffe for affording A. V. Murray an opportunity to invest in Redstone. . . ." The trust schedule relating to the Redstone stock contained a recitation that the transfer was "subject to payment of $9,000.00 to A. V. Murray for costs of stock." In connection with the transfer of this stock to the trust, Mr. Murray dealt with the attorney for the bank which about a year later became a trustee, and he negotiated the transfer with this person.

The record shows that from the time after Redstone contracted with Cities Service, Mr. Riffe participated in negotiations and made contacts relative to the possible sale of Redstone.

By a written representation dated November 1, 1962, Mr. Riffe stated to Wilshire that neither he nor any relative owned ten per cent or more of the stock of any company engaged in a similar line of business as Wilshire. At the time that this representation was made, the Redstone stock was owned by his daughters' trusts. Some time thereafter, and apparently in December 1962, the Redstone stock held by the trusts was sold to Inland, Inc. It appears that all of the outstanding Redstone stock was sold at that time. The purchaser of this stock required as a condition of its

purchase of the entire stock that there be a marketing contract whereby the Riffe Division would market the production of asphalt from the refinery formerly of Redstone.

Thereafter new schedules A were attached to the trusts of the Riffe children, and a bank became one of the trustees. This new schedule does not show ownership of the Redstone stock, but instead shows ownership of all or part of the purchase price therefor, together with other checks and property hereinafter discussed.

The trial court found that the trusts were irrevocable and were not under the control and direction of Mr. Riffe.

The record thus shows that the Redstone stock was stock in a competitive corporation. The record further shows that Mr. Riffe maintained contact with this competitive corporation and participated from time to time in negotiations concerning it. Had he owned this stock directly, there would be no question but what such ownership would constitute a violation of his employment contract and of his fiduciary position as an officer and director of Wilshire. The appellant urges that the fact that the stock was held in trust would make no difference because Mr. Riffe could not accomplish indirectly what he is prohibited from doing directly. Further the ownership of such stock by the trusts was contrary to the representations which he made on November 1, 1962, and was likewise contrary to the affidavit which he executed in May 1962.

The Appellees on the other hand urge that the court found that the trusts were irrevocable, found that Mr. Riffe did not control the trusts, and that therefore there was no breach of contract or violation of fiduciary duty.

It appears that in an analysis of the duties of Mr. Riffe and the facts of this case, his obligations arising under his employment contract as they relate to participation in com-

petitive corporations and his fiduciary duties as an officer and director are very much the same. The employment contract is perhaps made more specific by the subsequent affidavits and representations made by Mr. Riffe, thus the basic question presented is whether or not the facts that the trusts owned the shares of stock in Redstone insulated Mr. Riffe from liability under his employment contract or from any liability for breach of his fiduciary duties. There is no question but what the ownership of the Redstone stock by the trusts was not known by Wilshire, and in fact was so held contrary to the representations made by Mr. Riffe in November 1962.

The courts have had many opportunities to consider the duties which are owed by an officer and director to a corporation as related to the personal interests of such an officer or of members of his family. There is no question that a person in the position of Mr. Riffe in this case, both under his contract and as an officer and director, owed a duty to Wilshire to act in the utmost good faith. As a director and officer of Wilshire he occupied a fiduciary position relative to the stockholders and the corporation. Dunnet v. Arn, 71 F. 2d 912 (10th Cir.). A corporation is entitled to have its officers and directors actively promote its interests, and not to place themselves in a position where their personal interests conflict, or could conflict, with those of the corporation.

Mr. Riffe in his capacity as an officer of Wilshire, and as directed by a corporate decision, undertook to procure the release of the corporation from the contract with Cities Service. This was a difficult task, and was accomplished by inducing others to organize and substitute another company for Wilshire. These several business men organized Redstone for this purpose, and with some personal guarantees by Mr. Riffe, the desired result was accomplished. The personal involvement of Mr. Riffe, by way of his personal undertakings, was of course beyond his obligations to the company, and there is no evidence that they were in any way contemplated by the company in its direction to secure a release.

Shares of stock in Redstone then were offered for sale at cost by one of its organizers, Mr. Murray, to Mr. Riffe but were refused by him because of his employment contract. The shares were then transferred instead to the trusts he had created about this same time for his children. The trial court found this transfer to have been made by Mr. Murray ". . . to express his appreciation to L. E. Riffe for affording A. V. Murray the opportunity to invest in Redstone. . . ." The negotiation of the contract with Cities Service was done by Mr. Riffe as was Wilshire's release. All of this was clearly a corporate activity, and any benefits arising from it should not inure to the personal benefit of Mr. Riffe.

The record shows and the trial court found that Mr. Riffe rejected the offer of the stock to him directly because of his employment contract with Wilshire, yet there was accomplished indirectly what could not be done directly. The shares were transferred to the trusts for his children. These shares represented a personal benefit derived from a corporate transaction, and in view of the findings it is clear they were conferred on the trusts instead of on Mr. Riffe directly. This constituted a violation of his fiduciary duty as an officer and director to the corporation as well as a violation of his contract with it. The trial court was in error in its conclusions drawn from the findings of fact.

Certainly the duty of the director and officer here concerned can be no less than that of the employees considered by this court in Byer v. International Paper Co., 314 F.2d 831 (10th Cir.), where it was held that the employee ". . . is bound to a high degree of good faith toward his employer, and is not entitled to avail himself of any advantage that his position may give him to profit at the employer's expense beyond the terms of the employment agreement." Nor is it less than that considered in Pratt v. Shell Petroleum Corp., 100 F.2d 833 (10th Cir.).

The basic principle applicable to the facts at hand is well stated in the following quotation:

"Since the directors and other officers of a corporation whatever their relation may be technically, occupy a fiduciary or quasi trust relation toward the corporation and the stockholders collectively, it is thoroughly well settled that they cannot, either directly or indirectly, in their dealings on behalf of the corporation with others, or in any other transaction in which they are under a duty to guard the interests of the corporation, make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other stockholders, . . ." 3 Fletcher Cyclopedia of Corporations 284 (perm. ed. 1965 rev. vol.).

In the above two quoted cases from this circuit, it was also held that no showing of damage to the corporation need be made when the facts demonstrate the creation of a situation which lent inducement or temptation for wrongdoing, Pratt v. Shell Petroleum Corp., supra; Byer v. International Paper Co., supra.

The element of secrecy is clearly present as the record shows that Wilshire did not know of the ownership of the Redstone stock by the trusts. In fact, the record shows that Mr. Riffe represented in writing to the corporation that none of his family owned directly or indirectly more than ten per cent of the shares of a competing company.

The trial court concluded that Mr. Riffe acted in good faith, but this does not affect his liability. Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213; 3 Fletcher Cyclopedia of Corporations § 888 (perm. ed., 1965 rev. vol.). Again the showing that he created a situation where his personal interest came in conflict with that of the corporation was sufficient to show a breach of trust.

The trial court found these trusts to be irrevocable and not to be controlled by Mr. Riffe, but it is apparent that they were created at a crucial time during the contract termination negotiations and the initial assets placed in them

included the shares of stock in question and other assets also in issue here arising from the same transaction. Any increase in the assets of these trusts benefitted Mr. Riffe's family as a whole and benefitted him indirectly. He sought to accomplish by the trusts what he could not do directly. Thus assuming the trusts were valid they did not insulate him from liability for the breach of his fiduciary duty to the corporation. In Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799, the court considered facts somewhat similar to the ones before us except the legal principle concerned dealt with the corporation. The court there held liable the trustees of children of the officer-director for profits made in violation of fiduciary duties. The benefit inured to Mr. Riffe, and no issue of a constructive trust to be imposed on the trust assets is here presented.

We do not propose to treat at any length the burden which is placed upon a person in Mr. Riffe's position when the initial showing was made during the course of the trial that a possible breach of fiduciary duty had occurred. It is clear under these circumstances that an officer or director has the burden of fully explaining such a transaction and of showing its propriety. Geddes v. Anaconda Mining Co., 254 U. S. 590. The burden is certainly on the director or officer who buys property from the corporation to prove good faith in the sale, and its fairness to the corporation. Annot., 24 A.L.R.2d 89. The same rule must be applied to the situation presented here. Perlman v. Feldmann, 219 F. 2d 173 (2d Cir.); Mattingly v. Sisler, 175 P. 2d 796; Owens v. Musselman, 121 P. 2d 998; Looney v. Chastain, 395 P. 2d 571. No choice of law issue has been raised and there would seem to be no need to since the rule in its basic form appears to be universally applied.

As we have above indicated Redstone was competitive with Wilshire during at least a portion of the time in issue. This together with the undisputed ownership of thirty per cent of its stock by the Riffe trusts also constitutes a

breach of the employment contract between Mr. Riffe and Wilshire.

The Anco Commission:

As indicated above there was also placed in the trusts money from Mr. Murray which was indicated as one-halt of the commission paid to Mr. Murray by Anco Manufacturing Company which built the asphalt plant for Redstone. This commission was known to Mr. Riffe, and the trial court found that this money was also offered to Mr. Riffe directly but he rejected it because of his contract with Wilshire. The court also found that this money was so offered by Mr. Murray to express his appreciation for the opportunity to invest in Redstone. The money was thereafter paid to the trusts created for the Riffe children.

This money falls in the same category as the stock in Redstone. It was a profit obtained out of a transaction with or in connection with a competitor. The trust schedule shows that this money was in payment for Mr. Riffe's guarantee of the Redstone bank loan.A memorandum of one of the trustees states it was money Mr. Murray had received on behalf of Mr. Riffe. It was treated by the payor for tax purposes as an expense. Thus the exact reason why the money was paid in to the trusts is not clear, but the record shows it inured to the benefit of Mr. Riffe without the knowledge of Wilshire and was a violation of his fiduciary duties. Mr. Riffe had the burden to demonstrate propriety and the fairness of the transaction and he failed to do so.

Universal Asphalt Company:

Mr. Riffe invested, through his children's trusts, in Universal Asphalt Company, and took back an agreement whereby the trusts would receive a percentage of Universal's net profits. This corporation was owned by Mr. Thomas J. Masterson who was a salesman, apparently not full time, for Wilshire. Under his employment contract Mr. Masterson

was permitted to operate this company engaged also in the sale of asphalt. He testified that the product he sold was not handled by Wilshire and that the two corporations were not competitive. The trial court weighed the evidence and apparently found there was no competition. It considered the fact that Wilshire had permitted Masterson to engage in the business, although under a somewhat different employment contract. The evidence was at best contradictory on the competition issue and the trial court's finding was supported by substantial evidence. This being the finding, it cannot be said that in this regard Mr. Riffe violated his employment contract nor violated his fiduciary duty.

The record shows that the Riffe Division paid what are referred to in the record as "commissions" to the wives of certain employees of Owens-Corning Fiberglass Company, in order to make sales of asphalt to that company. This arrangement apparently lasted about a year and a half. For each ton of asphalt purchased by Owens-Corning the record shows that the wives of certain of its officials received a commission. There is evidence however that these payments were made known to the then treasurer of Wilshire after having been noted in detail, including names and purposes, during the course of an audit. Since the payments were so known, the appellant cannot recover against the appellees.

The remaining issues pertaining to Mr. L. E. Riffe and the other appellees and the creation of Riffe Industries has been considered, but we cannot say that the doctrine of "corporate opportunity," if this be a separate doctrine, is applicable, nor does the record support a cause of action based on ordinary trust or contract principles.

The case is REVERSED and REMANDED for further proceedings in accordance with this opinion.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 1 1969
JOHN F. DAVIS, CLERK

In The
SUPREME COURT OF THE UNITED STATES

No. 416, October Term, 1969

L. E. RIFFE, *Petitioner*,

vs.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*.

ADDITIONAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GERALD G. STAMPER
THORNTON & STAMPER
1111 Mid-Continent Building
Tulsa, Oklahoma 74103
918-587-2544

TABLE OF CONTENTS

Page

JUDGMENT AND ORDER IN AID OF JUDGMENT: ASSESSMENT OF DAMAGES Rendered by the United States District Court for the Northern District of Oklahoma on February 27, 1968 1

In The
SUPREME COURT OF THE UNITED STATES

No. 416, October Term, 1969

L. E. RIFFE, *Petitioner*,

vs.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*.

ADDITIONAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 5861—Civil

WILSHIRE OIL COMPANY OF TEXAS,
a corporation,
Plaintiff,

vs.

L. E. RIFFE, et al.,
Defendants

JUDGMENT AND ORDER IN AID OF JUDGMENT; ASSESSMENT OF DAMAGES

This matter comes on before the Court on February 14, 1968, upon Plaintiff Wilshire Oil Company's MOTION FOR ASSESSMENT OF DAMAGES, PURSUANT TO JUDGMENT,

AND TAXATION OF COSTS heretofore filed on or about January 10, 1968; and the Court having heard representations and argument by counsel for the respective parties hereto; having heard testimony and having considered certain exhibits; having considered the legal briefs of the parties; and being satisfied in the premises;

The Court finds that six trusts created by L. E. Riffe and his wife for the benefit of their daughters (Riffe Trusts) acquired from A. V. Murray 900 shares of the common stock of Redstone Asphalt and Petroleum Company for a total consideration of $9,000.00. A. V. Murray had agreed to give to the Riffe Trusts one-half of a commission in the total amount of $16,050.00 paid to him by Anco Manufacturing Company for his assistance in obtaining for Anco the contract for construction of an asphalt plant for Redstone. The one-half of the said commission, $8,025.00, was not actually paid to the Riffe Trusts, but was credited upon the purchase price of the Redstone stock. The balance of the purchase price, $975.00, was paid by cash by the Riffe Trusts to A. V. Murray.

The Court further finds that the 900 shares of Redstone stock were sold by the Riffe Trusts for $36,888.59. Thus, after deducting the sum of $975.00 paid in cash for the stock, $35,913.59 was the total realized from the sale of the Redstone stock and one-half of the Anco commission.

The Court finds that Plaintiff Wilshire is entitled to have a judgment against Defendant L. E. Riffe in the amount of $35,913.59 together with interest upon said sum at the rate of 6% per annum from the 31st day of December, 1962 to February 14, 1968, interest being in the amount of $11,037.14.

The Court finds in connection with the claim of Plaintiff Wilshire for a recovery of a percentage of the salaries and bonuses paid to the Defendant L. E. Riffe during the year in question should be denied and in this connection the Court finds that Defendant L. E. Riffe rendered good and valuable services to the Plaintiff Wilshire during said year.

That this Court denied this claim, that is the claim for a percentage of the salaries and bonuses at the end of the trial of the case, which denial was affirmed by the Appellate Court in that the Appellate Court did not reverse the trial Court in this regard.

The Court finds from the evidence presented that Plaintiff Wilshire has expended and paid costs in the amount of $6,524.23 and that Defendant L. E. Riffe has expended and paid costs in the amount of $4,736.18 in connection with this action and the appeal thereof. The Court further finds that, of the said sum expended by Plaintiff, the sum of $1,121.30 represents costs incurred on appeal to the United States Circuit Court of Appeals for the Tenth Circuit, as shown by the certificate of the Clerk of that Court.

The Court further finds that by virtue of the judgment rendered by the United States Court of Appeals for the Tenth Circuit in this action, Plaintiff Wilshire is entitled to recover the said sum of $1,121.30 from Defendant L. E. Riffe. The Court finds that, considering all factors of this action and its outcome, in fairness and justice, Plaintiff Wilshire and Defendant L. E. Riffe should each bear and pay the costs respectively incurred, except for those costs of $1,121.30 accrued on appeal.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Plaintiff Wilshire have and recover of and from Defendant L. E. Riffe the sum of $46,950.73, together with the sum of $1,121.30, or a total of $48,082.03, for all of which let execution issue.

Dated this 27 day of February, 1968.

/s/ LUTHER BOHANON

United States District Judge

Filed, Feb. 28, 1968. Noble C. Hood, Clerk, U. S. District Court

LIBRARY
UPREME COURT, U. S.

FILED
AUG 19 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 416

L. E. RIFFE, *Petitioner*

v.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD H. SHAW
MODESITT AND SHAW
1500 Denver United States
National Bank Center
1700 Broadway
Denver, Colorado 80202
Tel. 303-292-1650
Attorney for Respondent

IN THE

Supreme Court of the United States

No. 416

L. E. RIFFE, *Petitioner*

v.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, L. E. Riffe, seeks for the second time a Writ of Certiorari from this Court, containing the same issues, transactions, and substantially the same argument as were offered in his first Petition. The first Petition under the same caption (October Term, 1967, No. 184), was denied by memorandum order on October 9, 1967 (389 U.S. 822, 88 S.Ct. 50).

While the first Petition argued the issue whether, under the particular fact situation, Mr. Riffe should be found guilty of a breach of his fiduciary duty to Wilshire, which this Court declined to review, this Petition presents only the issue of what elements of damages are proper in a case in which a corporate principal has been found

guilty of a breach of his fiduciary duty to the corporation and, also, has violated his employment contract with that corporation.

It will be found from a reading of the Petition herein that, for the most part, Petitioner is exhuming the same grounds and the same argument advanced nearly two years ago, which were found without sufficient merit to warrant a review by this Court. He does so despite the realization that the only proper question in this Petition is a narrower one, as stated from that portion of his Petition entitled "Question Presented for Review," at page 3, to-wit:

> "He has already paid to Respondent an amount equal to the profit realized by the trusts from the stock. Is Petitioner also required to forfeit to Respondent all compensation earned during the period of ownership of the stock by the trusts?"

In the belief that Petitioner is not entitled to a Writ of Certiorari on the issues which previously were denied review, Respondent will discuss only that portion of the Petition pertaining to the issue of damages.

In support of his argument that he is entitled as an officer and director of Respondent to retain compensation for that period of time during which he was found to have breached his corporate fiduciary duties on the grounds that the company benefited financially during that period, Petitioner places great reliance on "one of the leading cases," *Richardson v. Blue Grass Mining Company,* 29 F. Supp. 658 (E. D. Ky. 1939), aff'd. *per curiam* 127 F.2d 291 (6th Cir. 1942), cert. denied 317 U. S. 639, 63 S. Ct. 30, 87 L.Ed. 515 (1952). That case sets out the general rule of damages in these situations (29 F. Supp. 658, at page 670):

> "The question as to whether the Johnsons forfeited all right to compensation for their services by

reason of breach of their fiduciary duties to the corporations and to the Tennessee Group as their co-stockholders is a troublesome one and demands careful consideration. The general rule that trustees who are faithless and dishonest in the performance of the duties of their trust forfeit all right to compensation is well established, and it applies to managing officers and agents of a corporation as well as to other persons acting in a fiduciary relation. Munro v. Smith, 1 Cir., 259 F. 1; Backus v. Finkelstein, D.C., 23 F.2d 357; Flint River Pecan Co. v. Fry, 5 Cir., 29 F.2d 457; Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 ALR 1; and Comingor v. Louisville Trust Company, 128 Ky. 697, 108 S.W. 950, 111 S.W. 681, 129 Am.St.Rep. 322. This rule is not so rigid and inflexible, however, as to leave no room for the exercise of judicial discretion. 65 C.J. 840, pp. 930, 931. 'Fortunately there is no unbending rule which a court of equity is bound under all circumstances to apply in cases of this kind; but that may be done, which in good conscience ought to be done in each particular case.' Appeal of Biddle, et al, 129 Pa. 26, 18 A. 474, 475."

Since it is the general rule, as cited by Petitioner, that trustees who are faithless and dishonest in the performance of the duties of their trust forfeit all right to compensation, applicable to managing officers and agents of a corporation as well as to other persons acting in a fiduciary relation, and this rule is applied subject to the equitable conscience and discretion of the trier of fact, there may be cases in which it is deemed unfair for a wrongdoing corporate principal to be required to forfeit compensation in the form of salaries and bonuses to his corporation, where it is found that his breach was not too severe and his long-term contribution to the corporation of merit. Obviously in the instant case, with the record before it and after careful consideration, the United States

Court of Appeals for the Tenth Circuit was of the opinion that Petitioner's breach of fiduciary duty was severe and the value of his contributions insufficient to overcome the application of the rule.

Petitioner cites no other authority of importance in support of his position, and Respondent respectfully submits that the decision in this matter is one that turns upon its own facts, will not specifically affect others than these litigants, and that the question presented is of no importance and unworthy of consideration by this Court.

Respectfully submitted,

RICHARD H. SHAW
MODESITT AND SHAW
1500 Denver United States
National Bank Center
1700 Broadway
Denver, Colorado 80202
Tel. 303-292-1650

Attorney for Wilshire Oil Company of Texas, Respondent